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Sept. 10, 2018

Exhibit 6

FILED

JUL 09 2018

ANGIE SPARKS, Clerk of District Court
By MAGGIE CONNOR, Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY**

IN THE MATTER OF the Application of
Big Foot Dumpsters & Containers, LLC
for Class D Garbage Service between
all points and places within Flathead
County

Cause No. DDV-2018-318

**ORDER ON PETITION FOR
PRELIMINARY INJUNCTION
AND WRIT OF MANDATE**

Petitioners Allied Waste Services of North America, LLC, and Montana Waste Systems, Inc., d/b/a North Valley Refuse and Evergreen Disposal (Petitioners) petition for immediate review of an administrative agency action, temporary restraining order and preliminary injunction and for writ of supervisory control, writ of mandate and writ of prohibition. Respondent Big Foot Dumpsters & Containers, LLC, and the Montana Public Service Commission oppose Petitioners' petition.

The parties have briefed the matter and the Court held oral argument on the 16th day of May, 2018. The matter is ready for decision.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises over the application of Big Foot Dumpster for a Class D certificate to haul garbage within Flathead County. On January 8, 2018, Big Foot filed its application before the Commission, which has authority over the licensing of garbage service providers.

On February 12, 2018, Petitioners filed protests against Big Foot's application. Petitioners supply garbage services within Flathead County and opposed Big Foot's application on the basis that there was no need for additional services to be provided by Big Foot.

After the protests were filed, the Commission issued an order setting forth procedures for discovery and hearing of Big Foot's application. The Commission's order directed the party to use certain guidelines in relation to discovery, which the Commission calls "data requests." The order further provided that Commission staff attorneys Jennifer Hill-Hart and Jeremiah Langston would resolve discovery disputes. The Commission's order does not state that the Commission itself would be submitting data requests to the parties.

On March 19, 2018, however, the Commission mailed data requests to Petitioners. About an hour after the Commission issued its data requests to Petitioners, Big Foot submitted data requests to Petitioners. In its data requests, Big Foot copied several of the data requests submitted by the Commission. Although Petitioners allege that the Commission had not made the same data requests of Big Foot, the record shows that the Commission did send out data requests to Big Foot.

The hearings before the Commission on applications in which there are protests are handled as adversarial proceedings. The applicant and any protesters offer witnesses and evidence. Members of the Commission may sit as quasi-judicial hearings officers. The Commission decides on the application and issues findings and orders based on the evidence presented at the hearing. The Commission may issue a certificate of necessity if it finds that public convenience requires the authorization of the service proposed.

In reaching its decision, the Commission has historically followed a set analysis. First, the Commission decides whether the applicant has demonstrated there is a public need for the service. If not, the application is denied. If the applicant does show a public need, the Commission then determines whether existing service providers can meet the need. If yes, then the application for an additional certificate will generally be denied. If existing providers cannot meet the public need, the Commission determines whether the grant of an additional certificate will harm the operations of the existing carriers. If yes, the application will be denied. If the answer is no, the Commission will grant the certificate, provided the applicant can provide the service. *See e.g.*, ¶¶ 82, 84, Order No. 7147, Docket No. T-10.36.PCN, May 23, 2011.

The burden is on the applicant to prove the foregoing elements, by a preponderance of the evidence.

Petitioners seek relief from the Commissions procedures as follows. Petitioners assert that the Commission improperly submitted data requests to Petitioners, in violation of its administrative rules and procedural order. By doing so, Petitioners allege that the Commission has provided assistance to Big Foot. This, according to Petitioners, violates their right to due process. If Petitioners are required to respond to the Commission's data requests, they will be required to disclose information harmful to their operations and helpful to Big Foot in its application.

Secondly, Petitioners assert that Commission staff attorneys have had improper *ex parte* communication with Big Foot's attorney.

Petitioners seek a preliminary injunction or writ of prohibition and writ of mandate against the Commission propounding its own data requests in this matter and relieving Petitioners from responding to the Commission's data requests.

Petitioners also seek to have the Commission appoint an independent hearing examiner to oversee the eventual hearing on Big Foot's application.

Upon Petitioners' petition, the Court entered a temporary restraining order restraining further action in the Commission, pending review by the Court.

Further facts are discussed below as necessary.

DISCUSSION

The Montana Administrative Procedures Act governs judicial intervention into, and review of, the actions of administrative agencies. Sections 2-7-701 to -711, MCA.

Section 2-4-701, MCA, provides, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

In this case, Petitioners allege that the Commission is operating under such a defective procedure as to render the entire administrative process defective and final review of that process would not provide Petitioners with an adequate remedy. Petitioners assert the Court should insert itself into and correct this procedure at this preliminary stage.

Petitioners claim the procedure used by the Commission is defective in two major ways.

First, Petitioners assert that the Commission, by issuing its data requests to Petitioners, has become involved as an advocate in this adversarial matter. This has placed the Commission, not in the role of an impartial adjudicative body, but as a party on one side of the dispute. Petitioners assert that the Commission issuing data requests to Petitioners is contrary to the Commission's administrative rules, procedural order, and past practices.

Second, Petitioners claim that the assistance provided by the Commission to Big Foot extends to its staff attorneys specifically assisting Big Foot in its discovery efforts. This assistance includes one staff attorney, who is designated to rule on any discovery issues, providing specific *ex parte* information to Big Foot's attorneys on how to formulate discovery.

Petitioners assert that the effect of these two actions is to deprive them of due process in the proceedings before the Commission.

The Court agrees. Indeed, the Commission itself has acknowledged some of its actions in this matter may not comport with due process.

A. The Commission Submitting Discovery Requests to Petitioners.

As to the issue of the Commission submitting data requests to Petitioners, the pertinent laws and principles are as follows.

Under § 69-12-201(2), MCA, the Commission has authority to prescribe rules in conformity with state law, applicable to all motor carriers. "Motor carriers" are defined as "a person or corporation . . . operating motor vehicles upon a public highway in this state for the transportation of . . . garbage for hire on a commercial basis[.]" Section 69-12-101(12), MCA.

Pursuant to this authority, the Commission has adopted ARM 38.2.3301, relating to discovery in matters over which it has jurisdiction:

38.2.3301 DISCOVERY

(1) Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying

the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to "trial" shall be considered references to hearing; references to "plaintiff" shall be considered references to a party; and references to "clerk of court" shall be considered references to the staff member designated to keep the official record in commission contested cases.

(2) Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission.

As is clear, nothing in this rule discusses the issuance of discovery, "data requests," by the Commission itself. The rule discusses only "the free use of data requests among the parties" and the "exchange of information among parties pursuant to data requests" as the primary method of discovery. The Commission, on the other hand, equates itself to a "court" for purposes of monitoring discovery.

In adversarial proceedings before an adjudicative body, it is inappropriate for the adjudicative body to insert itself into the dispute by submitting discovery. Parties conduct discovery; courts do not. *See e.g.*, M.R.Civ.P. 26(a) ("**Parties** may obtain discovery by one or more of the following methods:"); M.R.Civ.P. 26(b) ("Unless otherwise limited by court order, the scope of discovery is as follows: **Parties** may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense") (emphasis added). Rule 26, one of the rules of

civil procedure adopted by the Commission, is entitled “General Provisions Governing Discovery.”

In a letter dated May 14, 2018, from staff attorney Jeremiah Langston, the Commission withdrew its data requests to Petitioners. In this letter Langston does not specifically concede that the Commission is without potential authority to make such data requests but acknowledges that the procedural order in this case does not make explicit reference to the Commission issuing discovery. Langston further states that in future Class D motor carrier proceedings, the Commission will either amend its rule concerning discovery or include language in its procedural order allowing it to issue data requests upon the parties.

This concession by the Commission is consistent with the conclusion reached by the Court. In this proceeding, the Commission was without authority, either by administrative rule or its own procedural rule, to issue data requests. Petitioners’ requests that the Commission’s data requests be voided and that Petitioners be relieved of responding to these requests should be granted.

B. *Ex Parte* Communications Between Big Foot and Commission Staff.

The second complaint made by Petitioners concerns alleged *ex parte* communication between Big Foot and Commission staff attorneys.

In this particular matter, the Commission issued a procedural order on March 6, 2018. This procedural order contains guidelines for the use of discovery. “The Commission directs parties” to use these guidelines for data requests. The guidelines specify the formatting of these data requests and responses to them, the time frame for submitting such requests, and the method of objecting to such requests. In particular, the procedural order sets forth a specific procedure for resolving discovery disputes:

17. In order to promote the efficiency of the administrative process, staff attorneys Jennifer Hill-Hart

and Jeremiah Langston will act as examiners for the limited purpose of disposing of discovery disputes (including objections to data requests and motions to compel) and motions for protective order in this proceeding. Mont. Code Ann. §§ 69-2-101, 69-3-103; *see also* Mont. Admin. R. 38.2.306, 38.2.1501. "Any party may apply for reconsideration in respect to any matter determined" in a Commission order or decision, including the examiner's final written decision. Mont. Admin. R. 38.2.4806.

Ex parte communications between an adjudicative officer and parties to a proceeding before that officer are specifically prohibited by both statute and the Commission's administrative rules.

Unless required for disposition of *ex parte* matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.

Section 2-4-613, MCA.

The Commission has adopted an equivalent administrative rule:

38.2.3905 CONTACT BETWEEN PARTIES AND COMMISSION

(1) The commission declares its policy to be that after the giving of notice on a complaint, petition or application in a contested formal proceeding, or after notice of a tariff filing has been given and prior to the issuance of a final order thereon, no parties to the proceeding, or their counsel, shall discuss the merits of such matter or proceeding with the commissioners, or with the examiner involved, unless reasonable notice is

given to all parties who have appeared therein, to enable such parties to be present at the conference.

(2) When, after notice and prior to the issuance of a final order, letters from parties are directed to the commission, or any member of its staff, regarding a formal proceeding, copies of such letters shall be mailed to all parties of record and proof of such service furnished to the commission.

Petitioners have presented a series of e-mail correspondence¹ between the attorney for Big Foot and Jennifer Hill-Hart, the staff attorney designated by the Commission to dispose of discovery disputes in this matter. Most significantly, this e-mail correspondence referred specifically to the conducting of discovery in this matter. Hill-Hart provided Big Foot's counsel with suggested data requests to serve on Petitioners. Hill-Hart provided administrative and court cases to Big Foot. Hill-Hart also provided Big Foot with a staff advisory memorandum, thus providing guidance to Big Foot as to how to succeed in a discovery dispute between the parties.

Petitioners were not included in this correspondence. Because Hill-Hart was one of the staff attorneys designated by the Commission to resolve discovery disputes in this matter, this *ex parte* communication with one of the parties over discovery issues was inappropriate and violated both the Administrative Procedures Act and the Commission's rule barring *ex parte* communication.

A further example of the intertwining of adjudicator and advocate is that Hill-Hart was also the attorney who served the Commission's discovery requests on Petitioners. That Hill-Hart should serve discovery requests after being

¹ Petitioners also refer to telephone contacts between Hill-Hart and Big Foot's attorney. The subject of these contacts is unknown but Petitioners suggest these may be further improper *ex parte* communications between the Commission staff and Big Foot.

designated as the hearing examiner to resolve any discovery disputes is another illustration of infringement on the right of due process. Conceivably, Petitioners could object to the discovery propounded by the Commission and the same attorney who propounded the discovery would decide that dispute.

Petitioners' complaint on this basis should be granted.

C. Remedy.

The next step in the Court's analysis is to determine an appropriate remedy for the procedural deficiencies of which Petitioners complain.

Petitioners seek a writ of prohibition commanding the Commission to desist and refrain from requiring Petitioners to respond to any discovery based on the data requests from the Commission. As noted above, the Commission itself has in effect granted this remedy sought by the Petitioners. By virtue of the letter from staff attorney Langston, the Commission has withdrawn its data requests.

The second remedy sought by Petitioners is a writ of mandate directing this matter be heard before an independent hearings examiner. Petitioners argue that the Commission's issuance of data requests to Petitioners and the *ex parte* communication between Commission staff attorneys and Big Foot show that the Commission is biased against Petitioners and in favor of Big Foot. The only effective remedy, according to Petitioners, is for the Commission to appoint an independent hearing officer to consider Big Foot's application.

An essential element of due process is to have a contested case heard by an impartial tribunal. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *State v. Dunsmore*, 2015 MT 108, ¶ 11, 378 Mont. 514, 347 P.3d 1220. Thus, a district court judge may be disqualified if he or she has a personal bias or prejudice in a matter. Section 3-1-805, MCA. Judges are directed to promote the independence, integrity, and impartiality of the judiciary

and avoid even the appearance of impropriety. Allowing a judge's order to stand when the judge should have been disqualified because his impartiality might reasonably have been questioned does not uphold and promote the independence, integrity, and impartiality of the judiciary. Allowing a matter to proceed in such circumstances may cause uncertainty as to the validity of the judge's involvement and decisions in this matter. *Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶¶ 38-39, 387 Mont. 430, 395 P.3d 497.

While these authorities may not apply directly to administrative agencies, as noted above, the Commission sits in a quasi-adjudicative capacity in this matter and identifies itself as equivalent to a "court" for purposes of these proceedings. The Montana Supreme Court has recognized that:

Administrative agencies are not exempt from the constitutional restraints of due process requirements. Long ago the United States Supreme Court recognized that due process protections cannot be compromised based on an assertion that expediency was necessary.

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement.

Further, courts should not require parties to submit to demonstrably unfair administrative procedures. *Wilson v. Dept. of Pub. Serv. Reg.*, 260 Mont. 167, 858 P.2d 368 (1993).

The Court concludes that the procedural deficiencies discussed herein have so tainted the Commission's review of Big Foot's application and Petitioners' protests that the remedy should be the appointment of an independent hearing examiner.

In reaching this conclusion, the Court notes that subsequent to the filing of Petitioners' petition, initially challenging the Commission's issuance of data requests, the Commission withdrew those requests. Further, the Commission has not compelled Petitioners to respond to the Commission's requests.

What is more troubling, however, is the nature and extent of the *ex parte* communication between the Commission's staff attorney Hill-Hart and Big Foot's attorney. Big Foot attempts to characterize this as merely reviewing and using similar cases as a framework for this case. The Court disagrees. Big Foot communicated directly with the attorney appointed to resolve discovery disputes on matters of discovery and received information from that attorney. This is not equivalent to reviewing other cases; this is consulting with the adjudicator on matters before that adjudicator. This is in direct violation of § 2-4-613, MCA, barring "the person . . . charged with the duty of rendering a decision . . . in a contested case [from] communicat[ing] with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate."

This factor was not present or discussed in the case decided in this district in CDV-2018-455.

MAPA authorizes administrative agencies to appoint hearing examiners to conduct contested case hearings. § 2-4-611(1), MCA. The Agency Legal Services Bureau of the Department of Justice provides hearing examiners services to state administrative agencies and commission. ARM 23.1.101(2)(g)(ii)(B). This mechanism can provide the Commission with an independent hearing examiner, thereby providing the parties on all sides with a fair and impartial hearing process.

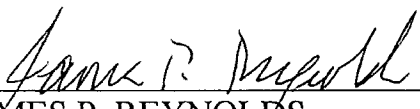
ORDER

IT IS ORDERED that Petitioners' Petition is **GRANTED** and **DENIED** as follows:

1. The Commission is prohibited from submitting discovery requests to the parties in this matter. Petitioners shall not be required to respond to any discovery requests from the Commission herein.

2. The Commission shall appoint a hearings examiner pursuant to § 2-4-611, MCA and ARM 23.1.101 to conduct the contested case hearing in this matter.

DATED this 9 day of July, 2018.



JAMES P. REYNOLDS
District Court Judge

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